No. 91-2019

In the Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY E. DICKERSON,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the rule of *Terry v. Ohio*, 392 U.S. 1 (1968) permit a police officer to perform a "pat frisk" for evidence, and then, upon discovering an item in a detainee's pocket which is clearly not a weapon, to manipulate the item, remove it, inspect it and only then arrest the detainee for possession of the item?

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STATEMENT OF THE CASE

Respondent Timothy E. Dickerson wishes to note the same objections to the statements of the case and facts as he did in his brief in opposition.[1]

Respondent additionally objects to this statement in Petitioner's Statement of the Case: "Having probable cause to believe the object was contraband, Officer Rose seized the object from Respondent's pocket." Petitioner's Brief on the Merits at 4. That statement does not appear in the trial court's findings nor in either opinion of the Minnesota appellate courts.

Respondent also wishes to note that the building from which the officers saw him leaving was a twelve-unit apartment building.

SUMMARY OF THE ARGUMENT

I. The Court's writ of certiorari should be dismissed as improvidently granted for three reasons. The first is that the case has become moot, and presents no "case or controversy" within the meaning of Article III, § 2 of the United States Constitution. The trial court's order issued after the Minnesota Supreme Court's decision in this case vacated the deferred adjudication and dismissed the case. That order rendered this case moot as defined in *Church of Scientology v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (U.S. Nov. 16, 1992). Moreover, by order this Court dismissed a writ of certiorari as improvidently granted in *Montana v. Imlay*, ___ U.S. ___, 113 S.Ct. 444 (1992). By the time *Imlay* was heard by this Court, it had a procedural history in terms of mootness strikingly similar to this case.

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[1]Respondent mistakenly characterized the piece of crack in his brief in opposition as "less than an ordinary household 200-milligram aspirin tablet . . ." Brief in Opposition at xii. Actually, it weighs the same.

The second reason why the writ should be dismissed is that the Petitioner has argued in its brief on the merits issues not preserved below. Since the issues were not preserved below, this Court lacks jurisdiction to hear them under 28 U.S.C. § 1257 (a) (1988).

The third reason why the writ should be dismissed is that the Petitioner has argued in its brief on the merits issues not raised in its petition for certiorari. This Court generally declines to hear issues not raised in the petition unless they are either necessary to resolution of the issue on which the writ was granted or essential to analysis of the decision below or to the correct disposition of other issues.

II. The Minnesota appellate courts properly applied the rule of *Terry v. Ohio*, 392 U.S. 1 (1968). This Court and lower courts throughout the country have uniformly held that a search for evidence cannot be justified by a *Terry* analysis, and that *Terry* does not permit removal and inspection of items which do not feel like weapons.

III. The search in this case cannot be supported as a sense-based search or seizure upon probable cause. There is no "search on probable cause" exception to the warrant requirement. This Court should not adopt a "plain-feel" exception to the warrant requirement.

The thoroughly-probing and manipulative search of the miniscule item in Respondent Dickerson's pocket was a "second" search within the meaning of *Arizona v. Hicks*, 480 U.S. 321 (1987).

Probable cause cannot be based solely on the sense of touch, though it may be based upon smell, hearing and sight. Observations by smell, hearing and sight are usually not searches. However, detection of items by the use of the sense of touch is a search and an intrusion into personal privacy which the law permits only in very narrow circumstances. *United States v. Robinson*, 414 U.S. 218 (1973); *Terry v. Ohio*, 392 U.S. 1 (1968). Detection of items by use of the sense of touch also does not provide

immediate information to the police officer, and is not as reliable as the sense of smell, hearing or sight.

The observation of an item in "plain-view" is not the constitutional equivalent of the detection of an item by the sense of touch. "Plain-view" is not a search, but "plain-feel" is. Small items concealed in a pocket of clothing are not "immediately apparent" within the meaning of the "plain-view" cases. For these reasons, the officer did not have probable cause to perform a "plain-view"-like seizure in this case. The Court's prior "plain-view" observations in *Texas v. Brown*, 460 U.S. 730 (1983) and in *Michigan v. Long*, 463 U.S. 1032 (1983) do not control the issues in this case because this case is not a "plain-view" case.

This case is also not controlled by the "search incident to arrest" rules, which is an issue the State failed to preserve below. This Court's decision in *Rawlings v. Kentucky*, 448 U.S. 98 (1980) does not control this case.

Respondent has no burden to demonstrate the unlawfulness of the search.

ARGUMENT

I. THE COURT SHOULD DISMISS ITS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

This Court should dismiss its writ of certiorari as improvidently granted for three reasons: 1) the case has become moot, 2) issues briefed by Petitioner were not preserved below, and 3) issues briefed by Petitioner were not encompassed by the petition for writ of certiorari.

A. This Case Is Moot Because The State of Minnesota Has Dismissed Its Case Against Respondent. This Court's Decision Cannot Affect Respondent, But Would Be Merely An Advisory Opinion

This case is moot in that it represents no "case or controversy" within the meaning of Article III of the United States Constitution. Mootness is a jurisdictional question. This Court has no authority to hear a case which does not present a live controversy. U.S. Const. art. III, § 2; Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Supreme Court Practice 709, 721 (6th Ed. 1986) (*hereinafter,* Stern and Gressman). The mootness rules of this Court, precedent on this question and four mootness cases this Court decided this term all support the dismissal of the Writ of Certiorari in this case.[2]

1. This Court's Recent Mootness Decisions

This Court's recent decision in *Church of Scientology v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (U.S. Nov. 16, 1992) directly supports Respondent's mootness argument. That case involved access by the Internal Revenue Service to certain materials. While the case was on appeal, the materials were handed over to the IRS, and the court of appeals then dismissed the appeal as moot. This Court stated:

> It has long been settled that federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." . . . [citations omitted] . . . For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the [case is moot]. . . *The availability of [a] possible remedy is sufficient to prevent [a] case from being moot.*

Id. at ___, 61 U.S.L.W. at 4004 (emphasis supplied).

In another recent case, this Court dismissed, apparently on mootness grounds, a writ of certiorari as improvidently granted. *Montana v. Imlay*, ___ U.S. ___, 113 S.Ct. 444 (1992). In that case, a defendant convicted of a sex offense was sentenced to probation, conditioned upon his participation in a sex offenders' program. *State v. Imlay*, 813 P.2d 979, 980 (Mont. 1991). Because he would not admit guilt, he was terminated from the program, his probation was revoked and he was sentenced to prison. *Id.* at 981-83. The trial court recommended that he not be eligible for parole until completing the prison's sex-offender program. *Id.* at 982. The Montana Supreme Court held that Mr. Imlay could not be compelled to admit his guilt of the crime for which he was convicted without violating his right against self-incrimination. *Id.* at 985.

This Court granted Montana's petition for certiorari. *Montana v. Imlay*, ___ U.S. ___, 112 S.Ct. 1260 (1992). While that petition was pending, the Montana trial court again sentenced Mr. Imlay to prison, *this time without the condition that he complete the sex-offender program.* The Montana Supreme Court refused to disturb the resentencing after this Court granted certiorari to review its prior ruling. *Imlay v. McCormick*, 829 P.2d 944 (Mont. 1992) (Table).

After the filing of briefs and oral argument, this Court dismissed the writ of certiorari as improvidently granted. The concurring opinion strongly implied that the intervening decision of the Montana trial court, issued *after* the Montana Supreme Court's decision, rendered moot the controversy upon which the writ of certiorari had been

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[2]Respondent's mootness argument also rests upon the authorities argued in his brief in opposition and in his supplemental brief on the petition for certiorari.

granted. *Montana v. Imlay*, ___ U.S. at ___, 113 S.Ct. at 444-45 (Stevens, J., concurring: "At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits--except, of course, for the potential benefit that might flow from an advisory opinion . . . it is not the business of this Court to render such opinions . . . .").

In two other cases decided this term, the Court instructed lower courts to dismiss actions which had become moot. In *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F.Supp. 698 (E.D.N.Y.), *vacated and remanded with instructions to dismiss as moot sub. nom. Gantt v. Skelos*, ___ U.S. ___, 113 S.Ct. 30 (1992), an appeal from the district court was brought from an order dismissing a challenge to New York's congressional redistricting plan. Because proceedings for the 1992 election had already commenced, and because the suit was filed prior to the state's 1992 legislative redistricting, the lower court dismissed the action as moot, and this Court by its action agreed. In *Yellow Freight System Inc. v. United States*, 948 F.2d 98 (2d Cir.), *vacated and remanded with instructions to dismiss as moot*, ___ U.S. ___, 113 S.Ct. 31 (1992), a writ of certiorari was brought from a lower court order which permitted candidates for delegate to a union convention to campaign on the employer's premises. This Court instructed the lower court to dismiss as moot, presumably because the delegate elections, and indeed the union convention, had already occurred. *See Yellow Freight System*, 948 F.2d at 106 n. 4.

2. Applying The Recent Mootness Decisions

In *Montana v. Imlay*, *Gantt v. Skelos* and *Yellow Freight System, Inc. v. United States* an intervening event occurred after, or contemporaneously with, the lower court's decision, which deprived that decision of any live controversy, within the meaning of Article III, by the time

it reached this Court. That is precisely what happened in this case as well. Nothing this Court decides on the merits can provide the State of Minnesota with any remedy reaching any live Article III controversy between it and Timothy E. Dickerson. *See Church of Scientology v. United States*, ___ U.S. ___, 61 U.S.L.W. 4003 (U.S. Nov. 16, 1992).

On May 9, 1990, the Hennepin County District Court found that Respondent Dickerson had possessed a piece of crack cocaine which weighed 0.2 gram (T. 65-66).[3] Acting under Minn. Stat. § 152.18 (1989), the district court deferred any adjudication and placed Mr. Dickerson on probation for two years, until May 9, 1992 (T. 68-69). Respondent appealed the district court's denial of his motion to suppress to the Minnesota Court of Appeals, which ruled in his favor on April 30, 1991. *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991).

The Minnesota Supreme Court then heard the case and issued its decision on March 20, 1992. *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992). The clerk of the Hennepin County District Court noted the appellate decisions, but took no steps to toll the running of the probationary period, to vacate the deferred adjudication or to schedule a hearing (J/A 2-4).

Six weeks after the Minnesota Supreme Court decision, on May 6, 1992, the Hennepin County District Court issued an order vacating the deferred adjudication and dismissing the case, according to the original terms of the sentence and Minn. Stat. § 152.18 (1989). The filing of that order was an intervening act which rendered further appellate proceedings before this Court moot, just as the intervening

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[3] "T" refers to the one-volume transcript of the evidentiary hearing on February 20, 1990, the district court's ruling on March 9, 1990, the March 13, 1990 hearing at which a pre-plea investigation was ordered and the stipulated trial and remaining proceedings on May 9, 1990. "J/A" refers to the Joint Appendix filed in this Court by the parties under Rule 26.

trial court order in *Montana v. Imlay* and the intervening elections in *Gantt v. Skelos* and *Yellow Freight Systems, Inc. v. United States* rendered those cases moot.

The district court's vacate-and-dismiss order contained no reference to the course of Respondent Dickerson's state-court appeal, and was issued, not because of the appeal, but because of Respondent's successful completion of the period of deferred adjudication. However, if the district court had issued its order vacating the deferred adjudication *because of* the state appellate proceedings, the State of Minnesota's appeal would not be moot. That is because, if it prevailed before this Court, the State would "obtain a remedy," *viz.*, vacation of the district court's order. *Church of Scientology v. United States*, ___ U.S. at ___, 61 U.S.L.W. at 4004. However, if the State of Minnesota prevails on the merits before this Court, it obtains nothing related to this case, because the criminal proceedings have been dismissed *for reasons unrelated to the appeal.* Nothing the State could obtain before this Court relates to any Article III case or controversy between it and Respondent. At best, the State would obtain an opinion with which it could advise its police officers. However, "it is not the business of this Court to render [such] advisory opinions . . . ." *Montana v. Imlay*, ___ U.S. at ___, 113 S.Ct. at 445 (Stevens, J., concurring).

The State of Minnesota claimed in its reply brief (on the petition for certiorari) that, regardless of the deferred adjudication given Respondent, he will suffer adverse collateral criminal consequences related to this proceeding, if he should again be charged with a controlled-substance offense. The State based this claim upon this Court's decision in *Pennsylvania v. Mimms*, 434 U.S. 106, 108 n. 3 (1977). However, as more thoroughly discussed in Respondent's Supplemental Brief at 5-7, this claim lacks foundation.

Nothing in Minnesota law precludes Respondent from obtaining a second deferred adjudication. In fact, the

Hennepin County courts have recently been known to award this type of deferred adjudication even to defendants with prior convictions relating to controlled substances.[4] Moreover, such deferred adjudications do not count as criminal convictions for any purpose under Minnesota law. *See* Respondent's Supplemental Brief, at 5-6.

The State also claimed in its reply brief that a deferred adjudication could be used in federal court under the federal sentencing guidelines. Petitioner's Reply Brief at 6. This type of speculation is wholly inadequate to defeat a mootness claim. *See Murphy v. Hunt*, 455 U.S. 478, 484 (1982) (Court had no reason to believe respondent would again be in position to challenge statute); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (mere possibility that plaintiff might some day return to prison inadequate to defeat mootness).

The fact of the matter is that this now nearly-27-year-old first-offender in state court, who satisfactorily completed the requirements of his deferred adjudication, has never been charged in federal court, and his history shows that he is unlikely to be charged in federal court. Moreover, the miniscule quantity of controlled substance at issue in this case doesn't approach the jurisdictional requirements of a federal prosecution.

Because of the intervening trial court decision which vacated the deferred adjudication in this case, and because the possibility of future adverse collateral criminal consequences relating to this deferred adjudication, is no more than speculative, this case is moot and this Court's writ of certiorari should be dismissed as improvidently granted. *See* Stern and Gressman, *supra* at 288-290 & IP(j) (intervening court decision may justify dismissing writ).

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[4] *State of Minnesota v. R.E.B.*, Hennepin County District Court File No. 90038600 (prior conviction for manufacture or sale of heroin); *State of Minnesota v. G.L.G.*, Hennepin County District Court File No. 90033001 (five prior convictions including one for possession of marijuana).

B. Petitioner Has Briefed Issues Neither Argued Nor Decided In The Minnesota Appellate Courts

In its brief on the merits, the State of Minnesota has made several distinct claims which it neither made to the district court nor to the Minnesota appellate courts. This Court lacks jurisdiction to review claims not made before the Minnesota courts. Therefore, this Court should dismiss the writ of certiorari as improvidently granted.

1. This Court's Issue-Preservation Rules

This Court has consistently held in criminal cases that it will not address issues not preserved in the courts below. *See California v. Acevedo*, ___ U.S. ___, ___ n. 2, 111 S.Ct. 1982, 1987 n. 2 (1991); *Buchanan v. Kentucky*, 483 U.S. 402, 404 n. 1 (1987); *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987); *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). *See generally* Stern and Gressman, *supra* at 157 (it is too late to raise the federal question for the first time before this Court). This rule applies to both criminal defendants and state prosecutors. *Illinois v. Gates*, 462 U.S. at 221-22 (state's failure to raise below a defense to a federal right claimed). However, in rare criminal cases, the Court has considered, over dissent, a claim raised in a different fashion in the courts below. *Wood v. Georgia*, 450 U.S. 261, 264-65 & n. 5 (1981); *Beck v. Alabama*, 447 U.S. 625, 630 n. 6 (1980); *Vachon v. New Hampshire*, 414 U.S. 478, 479 & n. 3 (1974).

Jurisdictional considerations preclude the Court from addressing issues not raised below. This Court's jurisdictional statute states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari

> where . . . any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . .

28 U.S.C. 1257(a) (1988) (emphasis supplied). *See also* 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, Federal Practice and Procedure: Jurisdiction, § 4022 at 697 (West 1977) (*hereinafter*, Wright and Miller I); *Id.* § 4022 at 868-71 (Supp. 1992) (*hereinafter*, Wright and Miller II). *But see Illinois v. Gates*, 462 U.S. at 222 (discussing whether rule is jurisdictional or prudential); Wright and Miller II, *supra* § 4022 at 868-71; Stern and Gressman, *supra* at 144.

In addition to the question of jurisdiction, the Court must consider whether it is prudent to address issues not raised below:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider [the constitutional issue raised] . . . .

Cardinale v. Louisiana, 394 U.S. at 439 (petitioner raised a constitutional challenge to a state statute not addressed below).

A party's failure to preserve an issue below will, however, be excused if the state court below actually considered the issue. *See* Wright and Miller I, *supra* § 4022 at 698; Wright and Miller II, *supra* § 4022 at 875; Stern and Gressman, *supra* at 158 (presumption that issue raised if discussed).[5]

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[5]However, several of the criminal cases cited by Wright and Miller to support such a practice rest upon facts which distinguish them from the present case. *Burch v. Louisiana*, 441 U.S. 130, 133 n. 5 (1979) (although the federal claim was not preserved below, the state supreme

2. The State's Issues Before The District Court

Before the trial court, the State of Minnesota argued in a written memorandum that the stop and frisk were permissible. The State also claimed that the inspection and seizure of the crack cocaine fell within the "plain-view" exception to the warrant requirement, inasmuch as the contents of the bag in Respondent's pocket were "immediately apparent." (J/A 18-23).

In its supplemental memorandum to the district court, the State more particularly argued that the police properly seized the crack cocaine under a so-called "plain-feel" exception to the warrant requirement (J/A 24-26). The State's oral argument at the conclusion of the evidentiary hearing did not vary from its written filings (T. 48-53).

3. The State's Issues Before The Minnesota Appellate Courts

In its brief before the Minnesota Court of Appeals, the State of Minnesota took two positions: first, that the search was permissible as a seizure on probable cause, and second, that the court should adopt a "plain-feel" exception to the warrant requirement. Brief for Respondent before the Minnesota Court of Appeals at 16-25. It also suggested, though, that the "plain-feel" issue need not be reached, because the seizure was permissible as one based on probable cause. *Id.* at 16, 21.

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court addressed it pursuant to a rule of state law); *Beecher v. Alabama*, 389 U.S. 35, 37 n. 3 (1967) (federal claim *was* argued before both the trial court and the state supreme court); *Mallett v. North Carolina*, 181 U.S. 589, 592 (1901) (federal claim *was* presented to the state supreme court. *See also Mills v. Maryland*, 486 U.S. 367, 371 n. 3 (1988) (state appellate court addressed issue as either plain error or under state law which did not require preservation).

Respondent filed a reply brief before the Minnesota Court of Appeals in which he argued that the "seizure on probable cause" issue had not been raised below. Reply Brief before the Minnesota Court of Appeals at 2.[6]

At oral argument before the Minnesota Court of Appeals, the State of Minnesota conceded that it had not argued the "seizure on probable cause" issue before the district court. *State v. Dickerson*, 469 N.W.2d 462, 467 (Minn. Ct. App. 1991). The Minnesota Court of Appeals treated the "seizure on probable cause" argument as one actually suggesting a "search incident" to an arrest on probable cause, and held that it would not address the issue since it was not argued to the district court. *Id.*

The State then petitioned for further review before the Minnesota Supreme Court. In its petition, the State sought review on this issue: "[w]here, during the course of a lawful weapons frisk, [the officer] felt an item that he knew from his sense of touch was crack/cocaine, was [he] justified in seizing the item?" Petition for Further Review at 2. The State also sought review of the court of appeals' refusal to adopt a new "plain-feel" exception to the warrant requirement. Petition for Further Review at 7-8. *The State admitted in this petition that it had not argued any "search incident to arrest" theory before the district court, and argued that the court of appeals mistakenly characterized its "seizure on probable cause" theory as a "search incident to arrest."* Petition for Further Review at 8-9 (emphasis supplied).

The Minnesota Supreme Court granted the State's petition for further review, and confined its review to the

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[6]Even the most generous view of this Court's Rule 14.1(a), which permits the Court to hear argument on subsidiary questions fairly included in the principal question, would not treat the State's "search incident to arrest" question, Petitioner's Brief on the Merits at 25-27, or the Solicitor General's exigent circumstances question, Brief for United States as *Amicus Curiae* at 23 n. 8, as fairly included in the question raised in the petition for certiorari. *See* § I(C) below.

court of appeals briefing without oral arguments (J/A 4). In its March 20, 1992 opinion, the Minnesota Supreme Court affirmed all three of the court of appeals' holdings: the officer's stop was proper; the officer had a right to perform a frisk; and the scope of the officer's frisk was excessive. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). It did not address the court of appeals' conclusion that the State's "seizure on probable cause" argument was actually a "search incident" to arrest argument which had been waived.

The Minnesota Supreme Court specifically declined to adopt the "plain-feel" exception to the warrant requirement urged by the State. *Id.* at 843-45. It discussed and distinguished a number of its prior decisions which, according to the State, permitted the "plain-feel" search in this case. *Id.* at 845. In doing so, the court discussed its prior decision in *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981). The court held that *State v. Ludtke* did not ratify the search in this case because *Ludtke* was a "search incident" to an arrest on probable cause. *State v. Dickerson*, 481 N.W.2d at 846.

Notwithstanding the fact that the State, in its petition for further review, specifically waived the "search incident to arrest" theory as applied to this case, the Minnesota Supreme Court, *in dicta*, explained in one paragraph why that theory did not apply to the present case. *Id.*

4. Issue Preservation Rules Applied

In light of these facts, the State failed to preserve either its "search incident to arrest on probable cause" claim or the Solicitor General's exigent circumstances claim in any form before any court below.[7] Neither question

[7]While it is clear that the "search incident" and exigent circumstances arguments were never preserved below, and, in fact, the former was specifically waived as to the former, it is less clear that the State's

should be considered by this Court.

In order to show that the Minnesota appellate courts' failure to mention these issues was not for lack of preservation, the State must show how the issues were raised below. Stern and Gressman, *supra* at 150. It has not done so. Moreover, the State affirmatively waived the "search incident to arrest on probable cause" issue below. In its petition for further review to the Minnesota Supreme Court, the State specifically told the Minnesota Supreme Court that it was *not* arguing a "search incident to arrest" theory. State's Petition for Further Review before the Minnesota Supreme Court at 8-9. That waiver in the court below binds the State before this Court, just as a specific waiver of a claim before this Court binds a party. *See Arizona v. Hicks*, 480 U.S. 321, 326 & n. (1987).

Nor does the mere fact that the Minnesota Supreme Court mentioned the "search incident" rule bring this case within the rule that an issue has been preserved if the state court addresses it. *See* Wright and Miller I, *supra* § 4022 at 698. As noted above, the Minnesota Supreme Court's one-paragraph discussion of "search incident" to arrest is inextricably tied to its discussion of why its prior decision in *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981) does not ratify the search in question. The fact that a state court may have applied the principle behind a legal issue does not excuse the State's failure to raise that issue, and its actual waiver of that issue in the courts below. *Illinois v. Gates*, 462 U.S. at 222-23.

Therefore, at a minimum, the State's arguments concerning "search incident" and the Solicitor General's argument on exigent circumstances are both improperly

"probable cause seizure based on touch" and its "intrusiveness of touch issues" are not "subsidiary question[s] fairly included [in the principal question]". Rule 14.1(a). The latter two issues were never addressed to the district court.

before this Court for lack of preservation in the courts below.[8] In light of the poor preservation of the State's issues and the dramatic effect upon the law that would flow from this Court's adoption of the State's arguments, it would be better for this Court to wait for another case posing those properly-preserved issues.

C. The Issues Briefed On The Merits Are Not Those On Which The Court Granted Certiorari

In its petition for certiorari, the State of Minnesota sought, and obtained, this Court's writ to decide this question:

> Does the Fourth Amendment to the United States Constitution permit a "plain feel" exception to its warrant requirement clause for seizures of objects where a police officer develops, through the *sense of touch* during a lawful pat down, probable cause to believe that the suspect possesses contraband or other evidence of a crime?

Petitioner's Petition for Certiorari at i (emphasis in original). The State of Minnesota's entire petition argued that the "plain-feel" exception it sought should be adopted by this Court, and described what it perceived as a conflict among the lower courts which had considered the issue. Petitioner's Petition for Certiorari at 10-21.

While the State of Minnesota phrased the issue in its brief on the merits in nearly identical terms, its brief contains discussion of other issues which appear outside the scope of this Court's Rule 24.1(a). Certainly, under this rule, the State's discussion of the "search incident to arrest

[8] *See* footnotes 6 and 7.

on probable cause" theory, which it waived below, is not properly before the Court. *See* Petitioner's Brief on the Merits at 25-27. The Solicitor General's exigent circumstances issue is also outside the scope of the rule and not properly before this Court. Brief for United States as *Amicus Curiae* at 23 n. 8.[9]

This Court's rules have long stated, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a). The Court's rules indicate that "the brief [on the merits] may not raise additional questions or change the substance of the questions already presented in [the certiorari petition]." Rule 24.1(a). As Stern and Gressman note,

> The purpose of requiring a statement of the questions presented is, of course, to apprise the Court and the respondent of the issues which the petitioner is seeking to have reviewed. The Court's determination of what petitions to grant is based upon the questions presented to it in the petitions. To allow petitioners subsequently to argue other questions would be to subvert the theory underlying the certiorari process: that the Court itself will decide what questions are significant enough for it to hear when it acts upon the petition.

Stern and Gressman, *supra* at 363. It is too late to raise federal issues in the brief on the merits before this Court, after certiorari has been granted on other issues. *Id.* at 158.

The rule that the Court will not consider issues not raised in the petition for certiorari is not jurisdictional. *See* Stern and Gressman, *supra* at 364. It does, however, appear to be one of general practice. The only exception to that rule is that the Court *will* consider issues not presented when "resolution of a 'question of law is a

[9] *See* footnotes 6 and 7.

predicate to intelligent resolution of the question on which [certiorari was granted]' . . ." or issues "not explicitly mentioned but 'essential to analysis' of the decisions below or 'to the correct disposition of the other issues' . . . ." Stern and Gressman, *supra* at 361 (citations omitted).[10]

Aside from the State of Minnesota's claim for the adoption of a so-called "plain-feel" exception to the warrant requirement, none of the issues it briefed were raised in the petition for certiorari or necessary for adjudication of that claim. Thus, the present case is not ripe for plenary review.

Therefore, because the case is moot within the meaning of Article III of the United States Constitution, because some of the State's issues were not preserved in the state courts below, and because some of the issues briefed by the State are not encompassed in the petition for certiorari, this Court should dismiss its writ as improvidently granted.

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[10]While in all the criminal cases cited by Stern and Gressman, *Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6 (1980); *United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 113 n. 9 (1982), this Court has decided in favor of justiciability, the Court has not been consistent and has often drawn a dissent in doing so. *See Eddings v. Oklahoma*, 455 U.S. at 120 & n. 1 (Burger, C.J., Blackmun, J., White, J., and Rehnquist, J., dissenting); *Vachon v. New Hampshire*, 414 U.S. 478, 481-83 (1974) (Rehnquist, J., Burger, C.J., and White, J., dissenting); *Hill v. California*, 401 U.S. 797, 805 (1971)("The petition for certiorari likewise ignored [an issue briefed on the merits.]").

II. THE MINNESOTA COURTS PROPERLY HELD THAT OFFICER ROSE'S SEARCH OF RESPONDENT VIOLATED *TERRY v. OHIO*

In the event that this Court concludes that the State's search issues are justiciable, Respondent Dickerson wishes to address them.

A. Introduction

The Fourth Amendment protects against unreasonable searches of persons, homes and effects:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This Court has said that "nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of [citizens] . . ." *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969); *accord, Soldal v. Cook County*, ___ U.S. ___, ___, 61 U.S.L.W. 4019, 4021 (U.S. Dec. 8, 1992) (principal object of Fourth Amendment is protection of privacy). The Fourth Amendment requires the government to obtain a lawful warrant prior to any search or seizure, absent a valid exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

An exception to the warrant requirement was carved out in *Terry v. Ohio*, 392 U.S. 1 (1968). The exception balanced the rights of a suspect stopped on an "articulable suspicion" and the right of police officers safely to conduct an informational stop and frisk where they suspect a

weapon is present. The exception was, by definition, limited to a search for weapons in order to protect the officer. Once the officer determined no weapon was present, the search was to end. *Id.* at 26; *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992).

In this case, the search exceeded the scope of a legitimate *Terry* search for weapons. Once he determined that Mr. Dickerson had no weapon, Officer Rose had no authority to conduct a further search of objects closed inside Mr. Dickerson's jacket pocket in an attempt to establish probable cause to arrest. This further search exceeded the scope of *Terry* and was a clear violation of Mr. Dickerson's right to be free from unreasonable search and seizure.

The Minnesota Supreme Court found that the frisk of Respondent Dickerson went well beyond *Terry*. It found that the officer's probing and manipulative search of the object in Mr. Dickerson's pocket established that he did not know immediately what it was. It also found that the officer, because he wanted to stop Mr. Dickerson to search him for weapons and drugs, intended to violate the limits of *Terry*. *State v. Dickerson*, 481 N.W.2d at 843-44.

In assessing the facts at issue in this case, this Court should defer to the factfinding of the Minnesota Supreme Court. *Sibron v. New York*, 392 U.S. 40, 63 n. 21 (1968) (a search case, in which this Court appeared reluctant to differ with findings below but did so because they were unarticulated "findings" of state appellate court which wrote no opinion); *Arizona v. Fulminante*, ___ U.S. ___, ___, 111 S.Ct. 1246, 1252 (1991) (voluntariness of confession).

B. The Limits Of *Terry v. Ohio*

More than a generation ago, in a case that, like this one, involved a prosecution for a possessory offense (liquor), Justice Jackson, who had participated in the Nuremberg war trials, said:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people . . . deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., Frankfurter, J., and Murphy, J., dissenting). *See also Florida v. Meyers*, 466 U.S. 380, 385-86 (1984) (Stevens, J., Brennan, J. and Marshall, J., dissenting).

By the time this Court issues its opinion in this case, 25 years will have elapsed since the seminal decision in *Terry v. Ohio*, 392 U.S. 1 (1968). In that case, Chief Justice Warren recognized that abuse by the police of the field interrogation process was perceived as part of a wholesale harassment of minority groups. The Court noted a survey reporting that field interrogation and frisks were "a severely exacerbating factor in police-community tensions." *Id.* at 14 & n. 11; *see also People v. Collins*, 463 P.2d 403, 405 (Cal. 1970). Yet, time has not alleviated this problem.[11]

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[11]An extreme example of a Minnesota police officer's abuse of the *Terry* rule occurred two years ago when an officer required a detainee not under arrest to disrobe on a public street behind the squad car, so that the officer could search him for drugs. *See* James Walsh, *St. Paul Strip Search Called "Intrusive, Offensive and Unnecessary" By Judge*, Minneapolis Star-Trib. December 6, 1990 at B7.

Terry v. Ohio permits a very limited intrusion into the personal security of a detainee, and balances the indignity of the intrusion against the need to protect the police officer.[12] If this Court adopts the claim made by the State in this case, the strict limits imposed by *Terry*, which granted the police narrow authority for a narrow purpose, will become the exception rather than the rule. Any number of containers carried by most people will be subject to examination, and huge varieties of items perfectly legal to possess, including aspirin and other pills, will be seized and examined.[13]

It is well to remember the facts which led this Court to its decision in *Terry v. Ohio*. In that case, the officer testified that he observed Mr. Terry and his companion make numerous passes back and forth in front of a business, some while looking in the store's windows. They would meet and confer. *Terry v. Ohio*, 392 U.S. at 6. At one point, they walked to a corner and conferred with another man. *Id.* This went on for some time. The officer believed, based upon his experience, that Mr. Terry and his companion were planning a robbery. *Id.* That is what led him to confront Mr. Terry and to frisk him for weapons.

This Court never contemplated that a *Terry* search could be conducted for anything but weapons that could be used to harm the officer or those nearby. Its opinion in *Terry v. Ohio* contains repeated provisos that the Court granted there only a narrowly-limited authority. *Id.* at 27-29.

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[12]Americans For Effective Law Enforcement, *et.al*, claim that this Court should adopt the State's proposed "plain-feel" exception as a "bright line" rule which will guide police officers and ensure their safety. Brief for Americans For Effective Law Enforcement *et.al* as *Amici Curiae* at 8. What *amici* ignore is that this Court created that "bright line" for the protection of police officers in *Terry v. Ohio*.

[13]An ordinary 200 mg. household aspirin weighs the same as the piece of crack cocaine at issue in this case.

One need go no further than the companion case decided the same day to see that the Court never contemplated authorizing a search for evidence of a crime. *Sibron v. New York*, 392 U.S. 40 (1968). There, the officer suspected that Mr. Sibron was distributing narcotics, but did not suspect that he was armed. Upon confronting Mr. Sibron, the officer told Mr. Sibron that "he knew what he was after,"—and reached into Sibron's pocket, removing heroin. *Id.* at 45. The Court held that the search conducted by the officer was so clearly unrelated to the officer's right to frisk for weapons that the search could not stand. *Id.* at 62-65

In the nearly quarter-century since *Terry v. Ohio*, courts considering the issue have almost unanimously held that *Terry* does not give the officer authority to search for evidence. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1049 n. 14 (1983); *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *United States v. Santillanes*, 848 F.2d 1103, 1107-1109 (10th Cir. 1988); *State v. Calhoun*, 502 So.2d 808, 813 (Ala. 1986); *State v. Collins*, 679 P.2d 80, 83 (Ariz. Ct. App. 1983); *Commonwealth v. Marconi*, 597 A.2d 616, 620-21 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992); *State v. Broadnax*, 654 P.2d 96, 101 (Wash. 1982); *State v. Hobart*, 617 P.2d 429, 434 (Wash. 1980).[14] Courts, including this Court, have also concluded that *Terry* prohibits the police from seizing or inspecting objects that are not, and could not be, weapons. *See, e.g., Smith v. Ohio*, 494 U.S. 541, 542-43 (1990); *United States v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979); *People v. Collins*, 463 P.2d 403, 406-407 (Cal. 1970); *People v. Pritchett*, 393 N.E.2d 1157, 1160 (Ill. Ct. App. 1979); *People v. Brockington*, 574 N.Y.S.2d 814, 815 (N.Y. App. Div. 1991); *Lippert v. State*, 664 S.W.2d 712, 721 (Tex. Crim. App. 1984); *Leake v. Commonwealth*, 265 S.E.2d 701, 704

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[14]Other decisions which agree with this point are collected in Table A, Appendix A-1.

(Va. 1980); *State v. Allen*, 606 P.2d 1235, 1236-37 (Wash. 1980).[15]

Many of those courts have disparaged claims by police officers that a particular object could have, by some flight of fancy, contained a weapon and should therefore have been inspected. In *United States v. del Toro*, 464 F.2d 520 (2d Cir. 1972), for instance, the officer conducting a frisk felt, seized and then inspected a folded ten-dollar bill. He said that he felt the bill might contain a knife or razor blade. *Id.* at 521. The court, however, said that under such a rationale, a razor blade could be concealed virtually anywhere, including Mr. del Toro's wallet, which was not inspected. *Id.* at 522. *See also People v. Collins*, 463 P.2d at 406-407 (officer's "fanciful speculation" that soft object might be atypical weapon must be supported by reasons why that detainee would be so armed and why that object feels like an atypical weapon); *People v. Robinson*, 509 N.Y.S.2d 803, 805-806 (N.Y. App. Div. 1986).

Just as in *Sibron v. New York*, 392 U.S. 40 (1968), the officer in this case set out to seek contraband (T. 9), and he never claimed that he observed or felt any type of weapon (T. 20). This testimony convinced the Minnesota Supreme Court that the officer "set out to flaunt the limitations of *Terry*, and he succeeded." *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992). Officer Rose surely knew, the moment he felt it, that the miniscule lump in Mr. Dickerson's jacket pocket was not a weapon. At that point, the frisk should have ended. *State v. Dickerson*, 481 N.W.2d at 844; *see also* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.4(b) at 520 (2d Ed. 1987) (further patting of object is not permissible once officer feels object which is obviously not a weapon) (*hereinafter*, LaFave). Instead, the officer commenced a second search in an effort to locate contraband. Both this

[15]Other decisions which agree with this point are collected in Table B, Appendix A-2.

Court's decision in *Terry v. Ohio* and the monolithic body of national authority noted here clearly support the Minnesota Supreme Court's decision that the officer's search in this case was improper. As the Minnesota Supreme Court noted, "[t]here was never any possibility that the object in [Mr. Dickerson's] pocket was a weapon . . . ." *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992).

Because the search in this case went well beyond the scope authorized by *Terry v. Ohio*, and was, indeed, a search for evidence (T. 9), the Minnesota Supreme Court properly concluded that the evidence should have been suppressed. This Court should affirm that decision.

III. OFFICER ROSE'S SEARCH IN THIS CASE CANNOT BE SUPPORTED AS A SENSE-BASED SEARCH OR SEIZURE UPON PROBABLE CAUSE

A. Introduction

The State of Minnesota claims that the search in this case was authorized as a "seizure based upon probable cause," which can be formed on the basis of touch. Petitioner's Brief on the Merits at 13-27. Although the State does not admit it, its real argument is for a new exception to the warrant requirement, one which permits the police to "search" on probable cause.[16] The State's position appears to rest principally on this Court's decisions in *Texas v. Brown*, 460 U.S. 730 (1983), *Michigan v. Long*, 463 U.S. 1032 (1983) and upon the following language contained in Professor LaFave's treatise:

[16]The State is technically casting its argument as a "seizure" rather than as a "search" in order to bring its claim within the "plain-view" rules enunciated most recently in *Horton v. California*, 496 U.S. 128 (1990) and *Arizona v. Hicks*, 480 U.S. 321 (1987). For reasons argued herein, "plain-feel" does not come within "plain-view" analysis. The State's argument is really one in support of a "search."

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.

3 LaFave, *supra* § 9.4(c) at 524 (2d Ed. 1987).[17]

The State's alternate claim is that the search in this case was permissible as a "search incident" to an arrest on probable cause which occurred after the search. Petitioner's Brief on the Merits at 25-27.

The search of Respondent Dickerson's pocket did not fall within a recognized exception to the Fourth Amendment's warrant requirement, because there is no general "search on probable cause" exception. While the search of automobiles has sometimes been upheld due to the mobility of vehicles, this "exigency" exception has never been applied to pedestrians. Nor should it be. The random search of pedestrians based upon the State's new "search on probable cause" exception would be the death of individual liberty and dignity.

There was no justification for the police officer's manipulation of the object enclosed in Respondent's pocket. According to the findings of fact of the Minnesota Supreme Court, Officer Rose did not determine, with any reasonable

[17]At the time LaFave wrote that language, he relied upon only two cases, *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981) and *State v. Alesso*, 328 N.W.2d 685 (Minn. 1982). The Minnesota Supreme Court has since pointed out that those cases justify no new exception to the warrant requirement. *State v. Ludtke*, the court said, is a "search incident" to arrest on probable cause, and *State v. Alesso* is a self-protective action properly taken under *Terry v. Ohio*. *State v. Dickerson*, 481 N.W.2d 840, 845-46 (Minn. 1992).

degree of certainty, what the tiny object was when he felt it during the *first search*, the pat frisk. This finding is confirmed by the fact that the officer performed the *second search* squeezing and sliding the object with his fingers, before seizing it.

The more intrusive, second search of Mr. Dickerson cannot be justified as a "search incident" to arrest.[18] Here, there was no probable cause to arrest based upon the frisk for weapons which *Terry v. Ohio* permits. Probable cause to arrest cannot be based upon a search which is then justified only by the arrest.

The adoption of the so-called "plain-feel" exception to the warrant requirement which the State urges would permit, in effect, random stops of pedestrians and searches far more intrusive than the simple frisk for dangerous weapons permitted by *Terry v. Ohio*. "Plain-feel" should not be adopted as an exception to the warrant requirement.

B. Although Probable Cause May Be Based Upon Some Human Senses, It Cannot Be Based Solely Upon The Sense Of Touch

It takes no revolution in the law to claim, as does the State, that probable cause may be formed on the basis of some human senses. More than forty years ago, the Court held that probable cause may be formed based upon the sense of smell. *Johnson v. United States*, 333 U.S. 10, 13 (1948). *See also United States v. Johns*, 469 U.S. 478, 482 (1985); *United States v. Haley*, 669 F.2d 201, 203 (4th Cir. 1982). The same is true for the sense of hearing, at least if no artificial amplification is involved, *see* 1 LaFave, *supra* § 2.2(a) at 327-28, and for the sense of sight, *see generally*

[18]In responding to this "search incident" argument, Respondent does so only on the assumption that this Court finds that the State's argument is properly before it and was not waived below.

Horton v. California, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987).

At least since *Katz v. United States*, 389 U.S. 347 (1967), an individual does not have a protected privacy interest in that which he knowingly broadcasts to the public. *Id.* at 351. For that reason, when the police obtain information leading to a probable cause determination based upon smell, hearing and sight (assuming they are properly in position to smell, hear and see), they have not conducted a search.

It is debatable whether one can have a privacy interest, protectible under the Fourth Amendment, in contraband that exudes a distinctive odor, *United States v. Johns*, 469 U.S. 478, 486 (1985). Nor can one have a privacy interest in overheard statements, unless he "justifiably relied" on the privacy of those statements. 1 LaFave, *supra* § 2.2(a) at 327. The same is true for objects exposed to public view. The observation of objects in "plain-view" is not a search, and does not invade any privacy interest. *Horton v. California*, 496 U.S. at 133.

A police officer's acts of smelling, hearing and seeing that which is exposed to all do not require an active intrusion into a suspect's personal space or privacy nor do they require the officer to cross a protected threshold. No one expects a police officer to deliberately forego use of these three senses. But, because the use of these senses is passive, the officer has conducted no search.

By contrast, an officer's use of the sense of touch *is* a search. There are numerous distinctions between a police officer's use of the senses of smell, hearing and seeing and an officer's use of the sense of touch.

First, unlike the other three sense-based procedures, an officer's use of the sense of touch requires a physical contact with the suspect. Unlike the use of the other three senses, the law has traditionally authorized an officer's use of touch in only two very specific contexts.

This Court has long recognized that an arrest on probable cause abrogates a suspect's Fourth Amendment right to be free of unreasonable searches. *See United States v. Robinson*, 414 U.S. 218, 235-36 (1973). The Court has also permitted a very limited intrusion upon a detainee when the officer has reason to believe that the detainee is armed and dangerous, either to himself or others nearby. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968). In contrast to an arrest on probable cause, the frisk permitted by *Terry v. Ohio* is a limited intrusion which balances the detainee's Fourth Amendment rights and the officer's need to protect himself. *Id.* at 22-26.

Both of these personal intrusions by touch, in contrast to police officers' use of the other three senses, are searches within the meaning of the Fourth Amendment. *United States v. Robinson*, 414 U.S. at 236; *Terry v. Ohio*, 392 U.S. at 16.

Second, a police officer cannot obtain information by use of the sense of touch without invading a suspect's personal privacy. What a person conceals in his pocket is protected from public view. By concealing an object in his pocket a person manifests his expectation of privacy in the pocket's contents. *See United States v. Ross*, 456 U.S. 798, 822-23 (1982) (Fourth Amendment protects owner of every container that conceals contents from public view); David L. Haselkorn, Note, *The Case Against A Plain Feel Exception To The Warrant Requirement*, 54 U. Chi. L. Rev. 683, 696 (1987), *citing, United States v. Chadwick*, 433 U.S. 1 (1977) (*hereinafter,* Haselkorn).

Third, touch by a police officer is more of an intrusion into a suspect's personal privacy than are smell, hearing and sight. Haselkorn, *supra,* at 695; *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992).

Fourth, touch does not provide immediate information as does smell of distinctive odors, hearing and sight. Use of the sense of touch requires speculation and is more susceptible to mistake and inaccuracy than the senses of

smell, hearing and sight. Haselkorn, *supra*, at 697; *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992); *Commonwealth v. Marconi*, 597 A.2d 616, 623 & n. 17 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992); *People v. Chavers*, 658 P.2d 96, 107 (Cal. 1983) (Rose, C.J., concurring and dissenting); *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982).

For all of these reasons, the use of the sense of touch by police officers to develop probable cause is entirely different than their use of the senses of smell, hearing and sight to develop probable cause. The State's effort to characterize all sense-based procedures as equivalent simply does not withstand scrutiny.

C. For Development of Probable Cause To Either Search Or Seize, "Plain-View" And The Sense Of Touch Are Not Equivalent For Constitutional Purposes, And Should Not Be Made So

The State claims that its so-called "plain-feel" exception to the warrant requirement is a logical "corollary" to the plain-view exception. Petitioner's Brief on the Merits at 18, 28. The State's position, which argues that an officer who feels contraband may therefore seize it under the "plain-view" rule without a warrant, is mistaken. "Plain-view" is not "a talisman that the police can invoke in order to ward off any constitutional scrutiny[,]" . . . nor does it "justify a cascading series of intrusions." *United States v. Martin*, 941 F.2d 1210 (6th Cir. 1991) (Table-Text in Westlaw). It does not permit "police officers to eviscerate the [F]ourth [A]mendment by performing warrantless searches one layer at a time." *United States v. Most*, 876 F.2d 191, 195 (D.C. Cir. 1989).

A "plain-view" inspection is not an exception to the warrant requirement because an observation by a police officer of an item exposed to public view is not a search,

and compromises no Fourth Amendment privacy interest of the owner of that item. *Horton v. California*, 496 U.S. 128, 133 (1990). A "plain-view" seizure, however, *is* an exception to the warrant requirement as long as probable cause exists. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

The State's argument assumes that an officer who feels contraband in a detainee's pocket during a frisk can identify it as contraband as readily as if he sees it. From this flows the State's argument that if the officer can feel contraband he can seize it without a warrant, as if it were in "plain-view", because the detainee has manifested no reasonable expectation of privacy. The argument rests upon two mistaken premises.

The first mistaken premise is that the State assumes that an officer's use of the sense of touch is as good, for probable cause purposes, as is his use of the sense of sight. For reasons noted above, principally those relating to intrusion upon privacy and speculation, that is not true.[19]

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[19]*See* John G. Saxe, *The Blind Men and the Elephant, reprinted in The Poetical Works of John Godfrey Saxe* 111 (Cambridge: Riverside Press, 1882)(emphasis in original)[also (New York: McGraw-Hill, 1963)]:

> It was six men of Indostan
> To learning much inclined,
> Who went to see the Elephant
> (Though all of them were blind),
> That each by observation
> Might satisfy his mind. . .
>
> And so these men of Indostan
> Disputed loud and long,
> Each in his own opinion
> Exceeding stiff and strong,
> Though each was partly in the right,
> And all were in the wrong!
>
> So oft in theologic wars,
> The disputants, I ween,

The second mistaken premise derives from the container cases, many of which rest upon *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13 (1979), *overruled on other grounds, California v. Acevedo*, ___ U.S. ___, 111 S.Ct. 1982 (1991).[20] However, the State's analogy to the container cases does not withstand analysis.

The most obvious distinction is that the interior of Mr. Dickerson's jacket pocket is not a separate container, and a search of the contents of that pocket can in no measure be compared to the search of, for example, a gun case, such as was suggested in the *Arkansas v. Sanders* dictum or of the lock-picking kit in *United States v. Grubczak*, 793 F.2d 458 (2d Cir. 1986).

More important, though, is the fact that the contents of Mr. Dickerson's pocket, when felt from the outside, are simply not immediately apparent. The container cases all rest upon the notion that, because of the type of container and the manner in which the contents are packaged, the contents are "immediately apparent," which is a requirement of the "plain-view" rule. *See Horton v. California*, 496 U.S. 128, 136 (1990); *Soldal v. Cook County*, ___ U.S. ___, ___, 61 U.S.L.W. 4019, 4023 (U.S. Dec. 8, 1992). *See also People v. Roth*, 487 N.E.2d 270, 271 (N.Y. 1985).

The State's analogy indeed becomes quite strained when it tries to compare the miniscule bit of cocaine in Mr. Dickerson's jacket pocket with the container cases in which the contents were "immediately apparent." In the following

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Rail on in utter ignorance
Of what each other mean,
And prate about an Elephant
Not one of them has seen!

[20]Because the Court's comments in n. 13 were not unique to the facts in that case, the dictum concerning containers the contents of which can be inferred from their outward appearance, is nothing more than traditional "expectation of privacy" analysis and survives this Court's action in *California v. Acevedo*.

cases, easily-distinguishable facts show that the police knew, to a reasonable certainty, what was in the containers after lawfully feeling them from the outside: *United States v. Diaz*, 577 F.2d 821 (2d Cir. 1978) (paper bag with bundles of currency); *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1980) (handgun in paper bag); *United States v. Ocampo*, 650 F.2d 421 (2d Cir. 1981) (paper bags with bundles of currency overflowing both seen and felt); *United States v. Russell*, 670 F.2d 323 (D.C. Cir. 1982) (handgun in paper bag); *People v. Chavers*, 658 P.2d 96 (Cal. 1983) (handgun in shaving kit); *State v. Ortiz*, 683 P.2d 822 (Hawaii 1984) (handgun in knapsack); *Matter of Marrhonda G.*, 585 N.Y.S.2d 345 (N.Y. App. Div. 1992) (same).[21]

The fact that touch is not as certain as sight, is not as immediate as sight and requires a greater degree of intrusion upon personal privacy than sight is what effectively negates the State's argument.[22] When a police officer lawfully on the premises sees a plastic bag of white powder, a syringe and a triple-beam scale on the coffee table, he knows immediately and certainly what he has seen.[23] By contrast, however, a police officer feeling a tiny lump in a detainee's pocket during a frisk, which is clearly not a weapon, does not know either immediately or certainly what he has felt. Touch, as is shown most directly in the facts of this case, requires suspicious circumstances *and* exploration, manipulation with fingers, squeezing, sliding in the pocket and other intrusive activity before an

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[21]These distinctions also show the folly of claiming that a "plain-feel" exception should be based upon a large number of cases based on a multitude of significantly-differing fact situations.

[22]*See* authorities cited in § III(B).

[23]A number of the so-called "plain-feel" cases, including the one most often cited in support of a search like the one in this case have required that the officer's tactile perceptions provide him "reasonable certainty" that he has felt contraband. *See United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

officer can formulate the same probable cause which he can form almost instantly with his eyes.

As applied to "plain-view" analysis, this Court has already held that, assuming the propriety of the initial intrusion, that type of manipulation and exploration is, in fact, a second search which the "plain-view" exception does not support. Conducting that second search, more than anything else, shows that the nature of the object is not "immediately apparent" within the meaning of the "plain-view" rule. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987). There, this Court held that, although officers were justifiably on the premises, their movement of a piece of stereo equipment in "plain-view" to record serial numbers was a second, impermissible, search, one which "is much more than trivial for purposes of the Fourth Amendment." *Id.* at 325.

Officer Rose's manipulation of the object in Mr. Dickerson's pocket, *after* he had ascertained that no weapon was present, was the same type of second search that this Court ruled impermissible in *Arizona v. Hicks*.[24] It is hard to imagine how, if an officer may not lift up a turntable to copy the serial number, he could subject Mr. Dickerson, under what the State claims is the same exception to the warrant requirement, to the personal intrusion which occurred here.

Moreover, "plain-view" requires that the officer legally be in a position to do the viewing. When Officer Rose began manipulating and sliding the object in Mr. Dickerson's pocket, he was no longer legally in a position to do that, because he had already ascertained that there was no concealed weapon. As one of the most-frequently cited decisions on the "plain-feel" exception noted:

[24]Professor LaFave agrees that Officer Rose's action in this case amounted to the type of "second search" found impermissible in *Arizona v. Hicks*. *See* 1 LaFave, *supra* § 2.2(a) at 54 (Supp. 1993).

> The requirement of a lawful "vantage point" suggests a corollary limitation: the doctrine would not sanction any use of the sense of touch beyond that justified by the initial contact with the container. For example, an officer who satisfies himself while conducting a *Terry* check that no weapon is present in a container is not free to continue to manipulate it in an attempt to discern the contents.

United States v. Williams, 822 F.2d 1174, 1184 (D.C. Cir. 1987); *United States v. Most*, 876 F.2d 191, 195 (D.C. Cir. 1989).

D. The Sense Of Touch Did Not Provide Probable Cause For A "Plain View"- Like Seizure In This Case

There may perhaps be instances under which an officer, given suspicious circumstances, might be able to develop probable cause by use of the sense of touch.[25] In this case, however, it is clear that Officer Rose did not have probable cause, either to arrest or to perform a "plain-view" seizure. *See State v. Dickerson*, 481 N.W.2d 840, 844, 846 (Minn. 1992). He did not, upon feeling the object in Mr. Dickerson's pocket, perform an arrest on probable cause. Probable cause is a requirement of the "plain-view" doctrine. *See Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *State v. Vasquez*, 815 P.2d 659, 663 (N.M. Ct. App. 1991); *Harris v. Commonwealth*, 400 S.E.2d 191, 195 (Va. 1991). "Probable cause is the *probability* of criminal conduct, not the *possibility* of criminal conduct[,]" and cannot be formed

[25]*E.g.*, *United States v. Pace*, 709 F.Supp. 948 (C.D.Cal. 1989), *affirmed*, 893 F.2d 1103 (9th Cir. 1990), in which officers performing a consensual frisk found two kilograms of cocaine, packaged like bricks, concealed under an elastic stomach support under a winter coat and sweatshirt.

on the basis of mere speculation. *Commonwealth v. Marconi*, 597 A.2d 616, 622 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992)(emphasis in original). The fact that Officer Rose felt compelled to continue sliding and manipulating the object, knowing that it was not a weapon, shows that he did not have the "reasonable certainty" which courts adopting the "plain-feel" exception require. *See United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

Nor were the other elements required for a "plain-view"-like seizure present in this case. The contents of Mr. Dickerson's pocket were not "immediately apparent" to the officer, as shown by his thorough manipulation of the object. *See Horton v. California*, 496 U.S. 128, 136 (1990). Additionally, that manipulation was outside the scope of a lawful *Terry* stop. Since there was no other legal basis permitting the officer to "observe" *i.e.*, see or feel, what the State says he did, this search cannot be justified by the State's proposed "plain-view/feel" analysis. *Horton v. California*, *id.*; *United States v. Williams*, 822 F.2d at 1184.

E. This Court's "Plain-View" Decisions In *Texas v. Brown* And *Michigan v. Long* Do Not Justify This Search

There are at least five reasons why this Court's decision in *Texas v. Brown*, 460 U.S. 730 (1983) does not support the search in this case. First, that case involved an occupant of an automobile, to which different rules apply. *Id.* at 733. By contrast, Mr. Dickerson was stopped while walking in a public alley.

Second, *Brown* involved the seizure of an uninflated balloon after the officer, lawfully in position to do so, saw other indicia of a narcotics violation. *Id.* at 733-34. The Court said that the distinctive character of the balloon

spoke volumes about its contents to the trained eye of the officer. *Id.* at 743.

Here, Officer Rose did not get to this point of the analysis. He could not see what Mr. Dickerson had in his pocket, nor did he see a container, the contents of which were "immediately apparent." Moreover, in this case there were none of the other suspicious circumstances like there were in *Brown*. Here, Mr. Dickerson, after leaving a 12-unit-apartment building shortly after 8:00 p.m., a building at which narcotics-enforcement activity had previously occurred, changed course when he saw the police car.[26] By contrast, there were many suspicious circumstances in *Brown*, including Mr. Brown's furtive movement with his hand, the presence of small plastic vials and the loose white powder and the fact that the balloon in question was tied and had white powder near the knot. *Id.* at 733-34.

Third, *Brown* was a "plain-view" case in which the officer had a right to observe what he did, which observations led to the formation of probable cause. *Id.* at 737-39. Here, the Minnesota courts found that Officer Rose had a right to frisk, but no right to conduct the thoroughly-exploratory second search that he did. *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992). That second search was outside of *Terry* or any other lawful justification. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).

Fourth, this Court's principal "plain-view" decision, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), suggests that the officer must come to the table with clean hands, *id.* at 469-70. The officer must not know in advance what he wants to seize and intend to seize it, and then rely upon "plain-view" as a pretense. *Id.* at 471. Here, Officer Rose testified that he intended to search Mr. Dickerson for an

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[26] *See* 3 LaFave, *supra* § 9.3(c) at 450-51.

illegal purpose (T. 9), and the Minnesota court so held. *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)("he set out to flaunt the limitations of *Terry* and he succeeded.").

Fifth, Justice Powell, concurring in *Brown* said that people don't carry innocent items in tied-off, uninflated balloons. That may be true for a balloon, but it isn't true for jacket pockets.

Contrary to the State's claim, Petitioner's Brief on the Merits at 21-22, this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983) simply held that an officer who is properly in a position to *observe* contraband does not have to ignore it, just because the justification for his presence is not an evidence-seeking one. *Id.* at 1050. There, after discovering marijuana during a *Terry* search of a vehicle, and arresting the driver, the officers found more marijuana in the trunk while impounding the vehicle. *Id.* at 1036. *Michigan v. Long* said nothing about an officer's use of other senses. Moreover, since the issue in that case was only whether an officer may conduct a *Terry v. Ohio* inspection of a vehicle for weapons after the driver is removed, *id.* at 1037, 1051-52, the Court's language about the observation of contraband is mere dictum.

In light of the fact that neither *Texas v. Brown* nor *Michigan v. Long* control the search issues in this case, the only remaining justification for the State's "seizure on probable cause" is the language from Professor LaFave's treatise. However, as Respondent noted earlier, there simply *is* no exception to the warrant requirement for searches and seizures merely on probable cause. Because of LaFave's reliance on *State v. Ludtke*, 306 N.W.2d 111 (Minn. 1981) when he wrote that language, because the Minnesota Supreme Court has since construed *State v. Ludtke* as a "search incident" to an arrest, and because LaFave cites no other exception to the warrant requirement to support his language, Respondent must assume that the

LaFave argument is itself a "search incident to arrest on probable cause" argument.

F. <u>This Search Cannot Be Justified As A Search Incident To An Arrest On Probable Cause</u>

In support of its "search incident" argument, that Officer Rose acted properly in seizing the crack cocaine before arresting Respondent Dickerson, the State of Minnesota makes the unsupportable claim that it does not matter whether the search preceded the arrest, or whether the arrest preceded the search.[27] Petitioner's Brief on the Merits at 25-26. The Solicitor General joins that argument. Brief for United States as *Amicus Curiae* at 22-23.

Both of these parties cite this Court's language in *Rawlings v. Kentucky*, 448 U.S. 98 (1980):

> Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Id. at 111. However, there are two problems with the use of this language to ratify the search in the present case.

The first reason why the quoted language fails to support the search is that both the State and the Solicitor General ignored the footnote appended to the quoted language. That footnote says, "The fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner." *Rawlings v. Kentucky*, 448 U.S. at 111 n. 6.

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[27] This argument assumes that the Court is willing to hear the search-incident argument, irrespective of the justiciability arguments made by Respondent in § I of this brief.

When the footnote is read with the quoted language, the implication of the language is quite different: a formal arrest may follow an incidental search when the arrest is based on factors *other* than what was seized in the search. *See* 2 LaFave, *supra*, § 5.4(a) at 517. The properly-quoted language from *Rawlings v. Kentucky* is, therefore, quite a different proposition than that argued by both the State of Minnesota and the Solicitor General.

Read in this light, the quoted language from *Rawlings* does not disturb the traditional rule that "an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63 (1968). *See also Henry v. United States*, 361 U.S. 98, 104 (1959). This Court reaffirmed that rule only two years ago (ten years after *Rawlings*) when it said:

> That reasoning, however, "justify[ing] the arrest by the search and at the same time . . . the search by the arrest," just "will not do."

Smith v. Ohio, 494 U.S. 541, 543 (1990). As Professor LaFave notes, "[s]uch bootstrapping would render the Fourth Amendment a nullity." 2 LaFave, *supra*, § 5.4(a) at 515; *Anderson v. State*, 553 A.2d 1296, 1301 (Md. Ct. Spec. App. 1989); *see also* 2 LaFave, *supra* § 5.4(a) at 115 (Supp. 1993) (characterizing in this fashion the lower court's ruling in *Smith v. Ohio*: "[i]ncredibly, some courts are unable to grasp this simple point.").

Respondent's conclusion about the quoted language from *Rawlings v. Kentucky* is further supported by the fact that this Court cited to *Cupp v. Murphy*, 412 U.S. 291 (1973) immediately after the quoted language from *Rawlings v. Kentucky*, 448 U.S. at 111. In *Cupp v. Murphy*, this Court held that a search for evidence under Mr. Murphy's fingernails was, in fact, a "search incident" to his arrest on probable cause, probable cause which existed *prior* to the search. *Cupp v. Murphy*, 412 U.S. at 295-96.

The second reason why the quote from *Rawlings v. Kentucky* does not support the search in this case is that the incidental search to which the quoted language refers did not produce the evidence for which Mr. Rawlings was prosecuted. It produced only a knife and some money. Rawlings was convicted of "trafficking in, and possession of, various controlled substances." *Rawlings v. Kentucky*, 448 U.S. at 100. The facts of that case were that officers with a search warrant approached Mr. Rawlings and Ms. Cox. One officer ordered Ms. Cox to empty her purse. She did so, and the contents included a considerable amount of controlled substances. She turned to Mr. Rawlings and told him to "take what was his." Rawlings then claimed ownership of the controlled substances. *Id.* at 101. Mr. Rawlings was then searched, and formally arrested.

These facts show that Mr. Rawlings was formally arrested, not for possession of the money and the knife, but for possession of the controlled substances in Ms. Cox's purse. That is the charge for which he was indicted. *Id.* At the time the police searched him and found the money and the knife, they already possessed probable cause to arrest him for possession of the drugs in the purse. That they had not formally done so, even though they could have, at the time they searched Mr. Rawlings is what this Court treated as inconsequential.

Applying the proper quotation of the *Rawlings v. Kentucky* language to the present case means that *Rawlings* does not support the State's argument. The State claims that Officer Rose's search of Respondent Dickerson was a permissible incidental search even though Mr. Dickerson was not arrested until after the search. However, probable cause to arrest Respondent did not exist, even under the view most favorable to the State, until after Officer's Rose's thoroughly-probing search of Mr. Dickerson's pocket. Since the *Rawlings* language demands reasons for the arrest independent of the search, it does not support the State's and the Solicitor General's views of the present case. *See*

People v. Collins, 463 P.2d 403, 408 (Cal. 1970); *State v. Ruffin*, 448 So.2d 1274, 1279 (La. 1984); *Anderson v. State*, 553 A.2d 1296, 1302 (Md. Ct. Spec. App. 1989); *People v. Hoffman*, 525 N.Y.S.2d 376, 378 (N.Y. App. Div. 1988).

Actually, this Court's decision in *Smith v. Ohio* is much closer to the facts of this case. There, the officer did not have even the slightest probable cause until he inspected Mr. Smith's bag. This court held that the arrest could not be justified by what the officer discovered in the illegal search of the bag. *Smith v. Ohio*, 494 U.S. at 542-43.

For all these reasons, it is clear that the search in this case cannot be sanctioned as a "search incident" which preceded an arrest on probable cause.

G. This Court Should Not Adopt A "Plain Feel" Exception To The Warrant Requirement

This Court should not adopt the State's proposed "plain-feel" exception to the warrant requirement, which would produce further erosion of Fourth Amendment liberty. *Commonwealth v. Marconi*, 597 A.2d 616, 621 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992). The warrant requirement is already so "riddled with exceptions [as to be] basically unrecognizable." *California v. Acevedo*, ___ U.S. ___, ___, 111 S.Ct. 1982, 1992 (1991) (Scalia, J., concurring); *see also State v. Ortiz*, 683 P.2d 822, 825 (Hawaii 1984). The Court should be reluctant to "send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain view inspection nor yet a 'full-blown' search." *Arizona v. Hicks*, 480 U.S. 321, 328-29 (1987).

For all the reasons already noted, "plain-feel" "is not a sound extension of 'plain-view' principles. *People v. Chavers*, 658 P.2d 96, 107 (Rose, C.J., concurring and dissenting). Tactile sensations, particularly like the one in this case, "could have been almost *anything*." *Commonwealth v. Marconi*, 597 A.2d at 622. Unlike

"plain-view" perceptions, tactile sensations are open to interpretation. *People v. Chavers*, 658 P.2d at 107 (Rose, C.J., concurring and dissenting). Absent exigent circumstances, the determination of whether those sensations amount to probable cause should be interpreted by a magistrate, not by the officer on the street. *People v. Chavers, id.*; *Johnson v. United States*, 333 U.S. 10, 14 (1948). Unlike other sense-based procedures, "plain-feel" requires a personal intrusion and does not, notwithstanding that intrusion, result in immediate knowledge as to the identity of an item. *State v. Broadnax*, 654 P.2d 96, 102 (Wash. 1982).

H. Respondent Dickerson Has No Burden To Demonstrate The Unlawfulness Of The Search

The State of Minnesota claims that Respondent is at fault for his failure to demand that the evidentiary-hearing judge conduct a demonstration as to exactly what the crack cocaine felt like. Petitioner's Brief on the Merits at 32. This position is meritless. It is now and has always been the State's burden to demonstrate the legality of a challenged arrest or search. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *State v. Vasquez*, 815 P.2d 659, 662 (N.M. Ct. App. 1991); *People v. Collins*, 463 P.2d 403, 406 (Cal. 1970); Richard B. McNamara, *Constitutional Limitations On Criminal Procedure*, § 15.12 at 243 (Shepard's 1982).

CONCLUSION

Some say that our society is currently waging a "war on drugs." Throughout our history, the people of the United States have shown themselves willing to make sacrifices in wars where necessary. Whether those wars were waged against internal or external aggressors, or against perceived plagues such as liquor or narcotics, those sacrifices have never included and should not now include the constitutional freedoms to which we are all entitled. As this Court has said, "a country[] preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 107, 126 (1866). *See also Florida v. Bostick*, ___ U.S. ___, ___, 111 S.Ct. 2382, 2389 (1991)("If that 'war [on drugs]' is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime.").

This Court cannot adopt the position urged by the State of Minnesota in this case without transforming its landmark holding in *Terry v. Ohio* into the exception rather than the rule. Adoption of the State's position would mean that any number of containers carried by most people will be subject to examination: keycases, change purses, makeup kits, wallets, matchbooks or boxes, film cannisters, cigarette packs and glasses cases. Huge varieties of items perfectly legal to possess will be retrieved and examined: aspirin or other pills, buttons, watch batteries, hard candy, chewing gum, marbles, cigarette lighters, combs, lipstick, thimbles, a small wad of paper, and even lint in one's pocket. To permit the kind of search for which the State seeks this Court's permission would be "to assume that all small objects in [a] pocket could be drugs." *Commonwealth v. Marconi*, 597 A.2d 616, 623 (Pa. Super. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992).

For all of the reasons noted here, this Court should affirm the Minnesota Supreme Court.

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TABLE A

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